

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	File No. BPED-19960920MA
)	Facility ID No. 83428
Holy Family Communications, Inc.)	NCE MX Group 960908
)	
For a New Noncommercial FM Station)	
at Lancaster, New York)	

MEMORANDUM OPINION AND ORDER

Adopted: April 2, 2013

Released: April 2, 2013

By the Commission:

1. The Commission has before it for consideration an Application for Review filed on October 11, 2011, by Mary V. Harris Foundation (“Harris”), an applicant to construct a new noncommercial educational (“NCE”) FM station at Williamsville, New York. Harris seeks review of a decision by the Media Bureau, Audio Division (the “Bureau”) denying reconsideration of the Bureau’s grant of Holy Family Communications, Inc.’s (“HFC”) mutually exclusive application to construct a new NCE station at Lancaster, New York and its dismissal of the Harris application.¹ In the *Reconsideration Decision*, the Bureau rejected Harris’ contention that its proposal should be awarded a threshold fair distribution preference because it would provide a second NCE service to 9.46 percent of the population within its proposed service contour, a percentage that came close to the ten percent minimum percentage required by the Commission for such a preference.² Harris also maintains that Section 73.7002’s specification of the ten percent figure is arbitrary and capricious. It also contends that the Bureau erred in failing to consider Harris’ December 10, 2007 Supplemental Petition to Deny (the “Supplemental Petition”), which alleged that HFC had undergone a “fatal” major transfer of control of its governing board, a major change that should have resulted in the dismissal of HFC’s application.

2. Based on our careful consideration of the Application for Review and the entire record, we deny review. The Media Bureau properly decided the matters raised in Harris’ Petition for Reconsideration, and we uphold its decision for the reasons stated in the *Reconsideration Decision*.

3. We also reject Harris’ claim regarding its Supplemental Petition, finding that the Bureau’s failure to consider the Petition was, at most, harmless error. The Supplemental Petition was filed more than one month after the Bureau had denied Harris’ Petition to Deny and granted the HFC application. Accordingly, treated as an informal objection, the Supplemental Petition should have been dismissed as untimely.³ We note that the Supplemental Petition would also have been dismissed as

¹ *Holy Family Communications, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 12791 (MB 2011) (the “*Reconsideration Decision*”).

² See 47 C.F.R. § 73.7002.

³ In 2007, the Commission issued an Order applying the NCE FM comparative point system to 76 groups of approximately 200 pending applications for new or modified NCE FM stations, directing the Media Bureau to issue a public notice establishing a deadline for the submission of petitions to deny the tentative selectees specified in that Order. *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101 (2007) (the “*Omnibus NCE Order*”). The Bureau issued a Public Notice which established May 2, 2007 as the deadline for

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untimely filed if considered as a supplement to Harris' November 26, 2007 Petition for Reconsideration.⁴ In this regard, the Supplemental Petition was defective because it was based on documents that Harris had not submitted previously, and Harris did not seek leave to file or include a showing that it could not have timely presented these matters or that their consideration was otherwise required in the public interest.⁵ The supporting documents are HFC's public filings with the Internal Revenue Service in 1999 and 2000 in which HFC identified members of its Board of Directors, including three individuals not identified as directors in its captioned application. This alleged omission forms the basis for Harris' allegation that HFC's Board had undergone a post-application filing change in control that constituted a major change, mandating the dismissal of the HFC application under Section 73.3573.⁶

4. We disagree. Based on the record here, we find that control of HFC did not change. We find persuasive the four declarations of HFC's President and the three individuals in question submitted by HFC under penalty of perjury establishing that those three individuals served solely as HFC's non-voting advisors, not as HFC directors,⁷ and that the documents that Harris contends suggest otherwise due to their identification of the three as HFC directors were the result of errors by counsel. In any event, we note that the Commission has directed the staff to waive the major change rule for pre-2007 NCE applicants that experienced gradual changes in their governing boards over long periods of time while their applications were pending, as long as the changes have not resulted from attempts by competing groups to gain control over the entity.⁸ Thus, even if Harris's allegations were true, that would not require dismissal of HFC's application.

5. ACCORDINGLY, IT IS ORDERED that, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), the Supplemental Petition to Deny of Harris IS DISMISSED and its Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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petitions to deny. See *Broadcast Applications*, Public Notice, Report No. 26455 (Rel. Apr 2, 2007). Harris filed its Petition to Deny on that date. The Bureau granted and denied Harris' Petition, in part, and granted HFC's application on October 26, 2007. See *Mary V. Harris Foundation*, Letter, 22 FCC Rcd 18931 (2007). Harris filed its Supplemental Petition to Deny on December 10, 2007, well after the grant. Accordingly, Harris' filing could not be considered as an informal objection because it pertained to an application on which the agency had already acted. See 47 C.F.R. § 73.3587.

⁴ 47 C.F.R. § 1.106(f).

⁵ *Id.* § 1.106(c).

⁶ *Id.* § 73.3573(a)(1), (b)(2), and (b)(3).

⁷ Section 4.8 of HFC's November 21, 1996 By-Laws expressly provides for an Advisory Committee appointed by the Board of Directors comprised of individuals who need not be directors themselves. See Harris Reply to Supplement to Petition to Deny and Motion to Strike, Attachment.

⁸ See *Omnibus NCE Order*, 22 FCC Rcd at 6125.